

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ARTESIA DAIRY, A Sole Proprietorship,)	Case No. 06-RC-01-VI
)	
Employer,)	32 ALRB No. 3
)	
and)	(August 2, 2006)
)	
UNITED FARM WORKERS OF AMERICA,)	
)	
<u>Petitioner.</u>)	

DECISION AND ORDER

A petition for certification in the above-entitled case was filed on February 28, 2006, and the election was held on March 7, 2006. The initial tally of ballots showed 25 votes for the Petitioner, United Farm Workers of America, 24 votes for “No Union,” and 15 unresolved challenged ballots. As the number of challenged ballots was outcome determinative, the Regional Director (RD) conducted an investigation, which resulted in a challenged ballot report issued June 12, 2006. In that report, he recommended that the challenges to the ballots of Alfredo Rodriguez and Jesus Manuel Meza be overruled, that the challenge to Angie Pacheco be set for hearing should it be outcome determinative after a revised tally of ballots, and that the challenges to the remaining twelve ballots be sustained. Artesia Dairy (Employer) timely filed exceptions to the challenged ballot report. The Employer argues that the twelve challenges the RD recommended to be sustained instead be set for hearing due to material factual disputes. In addition, the

Employer argues that the challenge to Jesus Manuel Meza, who had suffered a work-related injury, should be sustained because he did not have a reasonable expectation to return to work. The Employer does not except to the determinations regarding Angie Pacheco and Alfredo Rodriguez.

Consideration of evidence not submitted during challenged ballot investigation

The Employer submitted during the investigation various payroll documents, such as pay stubs, invoices, and petty cash vouchers, but did not provide any written statements or declarations in support of its position on the challenged voters. The RD based his recommendations on the payroll documents, position statements provided by the Petitioner, and on declarations from the challenged voters. Attached to the Employer's exceptions is a letter dated May 31, which includes attachments, including a declaration by Marvin Machado and various payroll documents, all relating to Jesus Manuel Meza. While the RD notes the March 29 original submission by the Employer, he does not mention the May 31 submission. In support of its exceptions, the Employer has submitted additional declarations, all of which were signed in June 2006, that contain alleged facts regarding the employment status of the twelve voters whose challenges the RD would sustain.

In many cases, these newly submitted declarations are the only source of facts contradicting those found by the RD in his report. In other words, their preclusion would leave many of the RD's conclusions unrebutted. We see no apparent rationale for allowing a party to submit evidence for the first time in support of its exceptions when, without justification, it failed to submit that evidence to the RD during the investigation. In our view,

this rule has the potential of making challenged ballot investigations meaningless, thus adding to delay in resolving election cases. Nevertheless, in the past the Board has permitted additional evidence to be submitted in support of exceptions. (See *Sam Andrews' Sons* (1976) 2 ALRB No. 28; *Oceanview Produce Co.* (1994) 20 ALRB No. 10.)

We are of the view that serious consideration should be given to prohibiting the submission of such belated evidence without legal excuse. However, because of existing precedent allowing this practice, we find that it would offend principles of fundamental fairness to change this rule at this stage of the proceedings. Moreover, the change may more appropriately be accomplished through an amendment to the Board's regulations. Consequently, we have considered the new evidence in determining as to each challenge whether there is a material factual dispute warranting an evidentiary hearing.

The Challenged Voters At Issue

Kasey Avila, Kennen Avila, and Kevin Avila

The Avilas are teenaged nephews of the owner of the dairy. In their challenged ballot declarations they stated, apparently with varying degrees of specificity, that they worked during the February 13 to February 26 eligibility period. The Employer submitted to the RD \$20 petty cash vouchers made out to the three for "general maintenance," all dated February 27." The RD, emphasizing that February 27 was beyond the eligibility period, that the \$20 figure did not match the boys' claim as to the number of hours worked, and the lack of formal payroll practices applied to them (i.e., cash payment, no deductions, worker identification or social security numbers, etc.), concluded that the Employer failed to provide

sufficient information to establish that the Avilas worked as agricultural employees during the eligibility period. In support of its exceptions, the Employer has submitted a declaration by Marvin Machado, the General Manager of the dairy, stating that the Avilas worked during the eligibility period, thus creating a material issue of fact warranting a hearing. In addition, the Employer makes several claims of error in the RD's analysis pertinent to these voters, as well as others, that warrant comment.

The Employer claims that the RD erred by assigning to it the burden of proof in establishing eligibility because the Avilas were not on the eligibility list, even though that was due solely to the RD, before the election, removing from the list all employees not on the regular payroll. This issue was addressed, though not to full resolution, in *Milky Way Dairy* (2003) 29 ALRB No. 4. In that case, at pages 6-7, the Board suggested that assigning a burden of proof based on the RD's earlier decision to remove names from the eligibility list and require those individuals to cast challenged ballots might be improper. The Board stated that, while precedent indicates it might be appropriate to assign the party challenging a voter the burden of producing evidence in support of the challenge, this is a burden of production, rather than one of persuasion. Ultimately, the Board came to no definitive conclusion in *Milky Way Dairy*, finding the issue moot because the employer had been assigned only a burden of production, which it met, allowing review solely on the basis of the preponderance of the evidence. We will take this opportunity to provide guidance by resolving this issue.

While it is appropriate for an RD, in the exercise of discretion, to require employees not on the regular payroll to cast challenged ballots so that their relationship to the

employer may be thoroughly examined in a subsequent investigation, we find it is improper to assign a burden of proof, or even production, based on that decision. Rather, in such circumstances the regional office should simply weigh the evidence gathered in the investigation to determine if there is a material factual dispute warranting an evidentiary hearing. It shall continue to be appropriate to assign to a party challenging a voter the burden of producing some evidence to support the challenge. (*Rod McLellan* (1978) 4 ALRB No. 22.)

The employer also argues that the RD placed too much emphasis on the irregular payroll practices the Employer utilized with these employees. The Board has never held that those not on the regular payroll are presumptively not eligible voters. To the contrary, the Board has held that agricultural employees found to have worked during the eligibility period are eligible to vote even if their names do not appear on the employer's regular payroll list. (*Valdora Produce Co.* (1977) 3 ALRB No. 8.) While such payroll practices may be viewed as casting some doubt on the accuracy of declarations containing assertions that the challenged voters did work during the eligibility period, they do not, without more, render such declarations unbelievable. Rather, the weight to be attached will depend on the circumstances extant in each case. In the present case, at this juncture we have insufficient evidence from which to judge the probative significance of the Employer's irregular payroll practices on the eligibility of the challenged voters.

John Flores

The RD recommended that the challenge to John Flores, who stated that he does yard work and cuts lawn and is supervised by the owner, be sustained for the same reasons cited with regard to the Avilas. The Employer submitted a petty cash voucher for \$100 paid to Flores. Machado's declaration, submitted with the exceptions, mirrors that of Flores and in addition states that Flores normally works a few hours each day and worked during the payroll period. Therefore, there is a material factual dispute requiring that this challenge be set for hearing. In addition, the hearing shall also address whether Flores' work constitutes "agriculture." (See 29 C.F.R. section 780.206.)

Caroline Hanstad

Ms. Hanstad has her own business, entitled QBTUTOR, and performs bookkeeping and time card summaries for the Employer. She performs similar work for other businesses. She submits invoices for her work. The RD concluded that she is an independent contractor, and thus not an employee eligible to vote in the election. In support of its exceptions, the Employer has submitted a declaration from Ms. Hanstad, in which she states that, under the direction of owner Hans Reitsma, she works three to four days a week as a bookkeeper handling payroll, accounts payable and receivable, as well as other duties as assigned.¹ The facts in the new declaration do not refute the evidence cited by the RD.

¹ She also states that it is the practice of the dairy to issue paychecks and petty cash vouchers on the Monday or Tuesday after the close of each pay period, and that all payments for work during the eligibility period would have been dated February 27 or February 28. This evidence, not presented to the RD, undercuts his reliance on the February 27 payment date as suggesting payment for work outside the eligibility period.

“Working under the direction of Hans Reitsma,” in the context of bookkeeping duties is not inconsistent with independent contractor status. There is no claim that, once assigned various tasks, Hanstad performs that work under the supervision of Reitsma. It is consistent with control of only the results to be achieved, which is fully compatible with an independent contractor relationship. (*North American Van Lines v. NLRB* (D.C. Cir. 1989) 869 F.2d 596, 599.) Therefore, the RD’s recommendation to sustain this challenge shall be affirmed.

Jesus Manuel Meza

Mr. Meza sustained a work-related injury on October 28, 2005. In his sworn declaration, he stated that this was the reason he did not work during the eligibility period. The RD concluded that Meza had a reasonable expectation to return to work at Artesia Dairy, emphasizing that there was no evidence presented that the company did not have a job for him when he was ready to return to work. He thus recommended that the challenge be overruled. The Employer submitted with its exceptions documents and declarations submitted to the RD on May 31, 2006, though it was not specifically cited in the RD’s report, which issued on June 12, 2006. According to the declaration of Marvin Machado (dated May 26, 2006), Meza, who had a short history of employment at the dairy prior to his injury, returned to work briefly on November 5, but reinjured his knee, resulting in the need for surgery. Meza was released for light duty beginning on May 22, 2006 (no kneeling or squatting, lifting over 30 pounds, or repetitive walking). However, Meza did not return to work, apparently because the Employer concluded that the restrictions were inconsistent with a milker’s duties. Machado further states in his declaration that due to the nature of the injury, there is no reasonable expectation

that Meza could ever return to work at the dairy. He also states that, as the dairy needs a particular number of milkers, Meza has been replaced.

If at the time of the election Mr. Meza had been replaced legally, so that under workers compensation laws he no longer had a right to return to his former job at the dairy, he would have had no reasonable expectation to return to work and would not have been eligible to vote. A bare assertion by Machado that Meza was replaced on some unspecified date obviously is insufficient to render a conclusion on this point. For example, if he was replaced, we do not know when that occurred or whether Meza was informed of this development. If he had not been replaced, we cannot determine based on the present record whether there was any expectation that Meza would eventually heal sufficiently to perform the job of milker, or that the dairy could accommodate any work restrictions. Therefore, this challenge shall be set for hearing, so that these factual issues may be resolved.

Antonio Morais

In his challenged ballot declaration, Morais stated that he has his own business as a cattle hauler and that he worked six hours during the eligibility period at \$8 per hour. He further stated that he was not supervised and used his own truck and trailer. He also stated that he sends invoices to the Employer for his work. The Employer submitted to the RD petty cash vouchers for “livestock hauling” (\$1526, dated February 27) and “freight and trucking” (\$1526, dated February 20). Morais stated that he similarly performs work for and submits invoices to other companies. The RD concluded that Morais is an independent contractor and, thus, not eligible to vote.

In support of its exceptions, the Employer submitted a declaration from Morais in which he states that he hauls cattle and attends sales on behalf of the dairy, and that he receives instructions from Hans Reitsma. He also states that he worked during the eligibility period. This declaration does not contradict Morais' original declaration and is consistent with independent contractor status. Therefore, the RD's recommendation that this challenge be sustained shall be affirmed.

Rosa Pacheco

In her declaration, Ms. Pacheco stated that she works cleaning both the company office (2 hours, 1 day per week) and the owner's house (6 to 8 hours per week), earns \$10 per hour, and is paid in cash. The Employer submitted a \$180 petty cash voucher for "office maintenance." While she did not get a W-2 from the Employer, she did receive one from another company for which she works and is currently on that company's payroll. The RD recommended that the challenge be sustained, relying on the irregular payroll practices and the assignment of a burden of proof to the Employer. Machado's declaration, submitted in support of the Employer's exceptions, states that Pacheco worked during the eligibility period cleaning the office and break room. Notwithstanding the improper assignment of a burden of proof, Machado's declaration creates a material factual dispute requiring that this challenge be set for hearing.

Sergio Rey

In his challenged ballot declaration, Rey provided facts consistent with supervisory status, specifically, that he supervises six workers who call him if they have a

problem. He also stated that he meets with two other supervisors, named Victor and Marvin, and that he was told he was a supervisor when he was hired. The Petitioner submitted to the RD unspecified evidence that Rey exercised supervisory functions. The RD received no contradictory evidence from the Employer, and concluded that Rey was a supervisor and thus not eligible to vote.

While the RD's analysis is unimpeachable based on the evidence presented to him, the Employer has now submitted a new declaration from Rey in which he states that he is merely a conduit for instructions from Hans Reitsma and Marvin Machado and exercises no supervisory duties. He also states that due to his greater experience he is assigned the more difficult projects at the dairy. Though we observe without deciding that this later declaration might reasonably be viewed as less credible than Rey's original one, on its face it contradicts the information relied on by the RD. Therefore, there is a material factual dispute that requires a hearing to resolve.

Hector Vera and Victor Vera

These two individuals fall into the same category as Sergio Rey, discussed above. In both cases, their challenged ballot declarations clearly reflect indicia of supervisory status, but declarations by the two submitted in support of the exceptions contradict their earlier declarations. These new declarations, like that of Rey, claim that they merely are conduits of information for management and specifically disclaim any supervisory authority. Therefore, these challenges also shall be set for hearing.

David Rose

In his challenged ballot declaration, Rose stated that he worked on February 18 for nine and a half hours installing stanchions (support posts) in the free stall barn, and was paid \$20 per hour. He also stated that he does not have his own business and is employed full time elsewhere. For reasons similar to other challenges, namely irregular payroll practices and assignment of the burden of proof to the Employer, the RD concluded that there was insufficient evidence to establish that Rose was employed during the eligibility period. With the burden of proof removed from the analysis, Rose's eligibility cannot be resolved at this juncture. In addition, the limited information available concerning the nature of the work performed by Mr. Rose leaves open the possibility that Rose falls within the construction exception. (See Labor Code section 1140.4, subdivision (b).) For these reasons, this challenge shall be set for hearing.

John Verkaik

Mr. Verkaik is a mechanic who in his challenged ballot declaration described himself as the head mechanic who had hired Taylor Howarth, and supervises Howarth and another fulltime worker. He is paid \$20 per hour. In addition to this information, the RD cited evidence submitted by the Petitioner that supports the conclusion that Verkaik is a supervisor. In his declaration submitted in support of the exceptions, Machado states that Verkaik has no supervisory duties, nor authority to hire or fire, and merely gave instructions as necessary to less skilled mechanics. Again, though this new declaration may not be

accorded in the final analysis nearly as much weight as Verkaik's original declaration, there is a material factual dispute requiring that this challenge be set for hearing.

ORDER

In accordance with the discussion above, the challenges are resolved as follows:

Sustained

Caroline Hanstad
Anthony Morais

Overruled

Alfredo Rodriguez

Set for Hearing

Kasey Avila
Kennan Avila
Kevin Avila
John Flores
David Rose
Sergio Rey
Hector Vera
Victor Vera
John Verkaik
Jesus Manuel Meza
Angie Pacheco
Rosa Pacheco

DATED: August 2, 2006

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

ARTESIA DAIRY, a sole proprietorship
(United Farm Workers of America)

32 ALRB No. 3
Case No. 06-RC-1-VI

Background

An election was held on March 7, 2006. The initial tally of ballots showed 25 votes for the Petitioner, United Farm Workers of America, 24 votes for “No Union,” and 15 unresolved challenged ballots. The Regional Director (RD) issued his challenged ballot report on June 12, 2006. In that report, he recommended that the challenges to the ballots of Alfredo Rodriguez and Jesus Manuel Meza be overruled, that the challenge to Angie Pacheco be set for hearing should it be outcome determinative after a revised tally of ballots, and that the challenges to the remaining twelve ballots be sustained. Artesia Dairy (Employer) timely filed exceptions to the challenged ballot report. The Employer argues that the twelve challenges the RD recommended to be sustained instead be set for hearing due to material factual disputes. In addition, the Employer argues that the challenge to Jesus Manuel Meza, who had suffered a work-related injury, should be sustained because he did not have a reasonable expectation to return to work.

Board Decision

While questioning the wisdom of allowing parties to submit, without legal excuse, evidence in support of exceptions that they did not submit to the RD during the challenged ballot investigation, in light of prior decision allowing this practice, the Board concluded that it must permit it in this case. In addition, the Board held that, while it is appropriate for an RD, in the exercise of discretion, to require employees not on the regular payroll to cast challenged ballots so that their relationship to the employer may be thoroughly examined in a subsequent investigation, it is improper to assign a burden of proof, or even production, based on that decision. Rather, in such circumstances the regional office should simply weigh the evidence gathered in the investigation to determine if there is a material factual dispute warranting an evidentiary hearing. It shall continue to be appropriate to assign to a party challenging a voter the burden of producing some evidence to support the challenge. In light of the additional evidence submitted by the Employer, as well as the absence of a burden of proof, the Board held that there was a material factual dispute warranting a hearing on the challenge to Jesus Manuel Meza, as well as ten of the twelve challenges that the RD recommended be sustained. The Board sustained the RD’s conclusion that two challenged voters were ineligible independent contractors, finding that the Employer’s new evidence failed to contradict the evidence cited by the RD.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD
OF THE
STATE OF CALIFORNIA

In the Matter of:)	
)	
UNITED FARM WORKERS OF AMERICA)	Case No. 06-RC-01-VI
)	
)	
Petitioner,)	<u>CHALLENGED BALLOT REPORT</u>
)	
and)	
)	
ARTESIA DAIRY, A Sole)	
Proprietorship)	
)	
Employer)	
)	

A Petition for Certification was filed on February 28, 2006 and an election was held under my direction and supervision on March 7, 2006¹, among the employees of the Employer in the appropriate unit consisting of all its agricultural employees in the State of California.

After the election, the parties were given a tally of ballots, a copy of which is attached as Exhibit A. The tally showed that 25 votes were for the Petitioner and 24 votes were for "No Union". There were 15 unresolved challenged ballots.

¹ All dates will refer to the year 2006, unless otherwise indicated.

Because the number of challenged ballots was sufficient to effect the outcome of the election, the undersigned, under Section 20363(a) of the Regulations of the Agricultural Labor Relations Board, after reasonable notice to all parties to present relevant evidence, has completed an investigation of the challenged ballots, duly considered all evidence submitted by the parties and otherwise disclosed by the investigation, and issues this challenged ballot report.

I.

THE CHALLENGED BALLOTS

The 14 workers listed below were challenged on the basis that their names did not appear on the eligibility list and were not employed in the appropriate unit during the applicable payroll period, February 13 through 26 (Regulations, Section 20355(a)(2)). The Employer states that they had worked for the Employer during the eligibility period:

1. Kasey Avila
2. Kennan Avila
3. Kevin Ayala
4. John Flores
5. Caroline Hanstad
6. Jesus Meza
7. Antonio Morais
8. Angie Pacheco
9. Rosa Pacheco
10. Sergio Rey
11. Alfredo Rodriguez

12. David Rose
13. Hector Vera
14. Victor Vera

One worker, John Verkaik, was challenged on the basis that he was a supervisor as defined in Labor Code Section 1140(j).

On May 24, the Region sent Employer and Petitioner a letter requesting that they agree to open the challenged ballots of Jesus Meza and Alfredo Rodriguez. The Region determined that the evidence established that they were eligible to vote and their votes should be counted. Petitioner agreed to open both challenged ballots.

Employer did not agree to open Meza's challenged ballot and did not provide a response to Rodriguez' challenged ballot. After reviewing the evidence, the Region recommends that both Rodriguez' and Meza's challenged ballots be opened.

II.

THE INVESTIGATION

Prior to the March 7 election, the Region received the Employer's Response to the Petition for Certification. The Employer submitted payroll summaries for the February 13 to February 26 payroll period for Alfredo Rodriguez, John Verkaik, Sergio Rey, Hector Vera, Victor Vera, and Angie Pacheco. The Employer also provided petty cash vouchers for

David Rose, John Flores, Antonio Morais, Rosa Pacheco, Kannen Avila, Kevin Avila, and Kasey Avila. For worker Caroline Hanstad, the Employer submitted a business invoice for data entry work.

The Region determined that this information was insufficient to establish that these workers were employed by the Employer during the eligibility period and these workers' names were not put on the eligibility list.

At the March 7 election, workers who were not on the eligibility list were challenged by the Board and were asked to provide signed sworn statements to determine their eligibility.

On March 7, the Region requested that the Petitioner and Employer submit their positions, and any of the following information, with regard to each respective challenged voter:

1. Detailed information regarding the job duties and responsibilities of each challenged voter;
2. State of California Quarterly Contribution Return made to the California Employment Development Department by Artesia Dairy for each quarter in 2005 and 2006;
3. Quarterly Report made by Artesia Dairy to the Workers' Compensation Carrier for each quarter in 2005 and 2006;
4. Any documentation, such as ledgers, time cards, time sheets, time card summaries, check stubs, billings or invoices from the challenged voters to

Artesia Dairy for their services, showing the days and hours worked and the type of work performed during 2006; and

5. All payroll documents and summaries and the individual's employment status with the company, e.g. on approved leave, vacation, disability, etc.

On March 20, the Petitioner provided a written statement on each challenged voter. The Petitioner objected to the counting of the following ballots: Sergio Rey, Antonio Morais, Victor Vera, Angie Pacheco, Caroline Hanstad, Hector Vera, John Flores, Kevin Avila, Rosa Pacheco, John Verkaik, Kennen Avila, Kasey Avila, and David Rose. The Petitioner did not object to counting the ballots of Alfredo Rodriguez and Jesus Meza.

On March 29, the Employer's response included payroll summaries and pay stubs, and petty cash vouchers, but did not provide any written statement regarding its position on the respective challenged voters

The Region reviewed this documentation from the Petitioner and Employer submitted and conducted its own investigation on the evidence received.

The responses from the Petitioner and Employer along with declarations from the challenged voters have been considered in the following analysis.

III.

ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

The Agricultural Labor Relations Act's intent was to equalize the bargaining power between the Employers and those who, until the establishment of the Act, were without such power in the work place - i.e. those who work for another for hire. Accordingly, independent contractors, whose position affords them a bargaining power equal to the Employer, could not properly be included as "employee" under the Act.

In *Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341 (1984), the California Supreme Court case held that full-time share farmers who signed independent contractor agreements with the employer were employees deserving the protection of the workers' compensation laws.

These share farmers worked full-time as cucumber harvesters, did identical work as the company's other harvesters, integrated themselves in the company operations because they did the same work, and returned to the company on a regular basis every season for several years. The Court found that these workers, who did similar work as the regular employees, were not independent contractors but employees of the company. *Borello* established that the

permanent integration of these share farmers into the heart of the business is a strong indicator that they were employees.

The Court presented eight factors in determining an independent contractor:

- (a) Whether the one performing services is engaged in a distinct occupation or business;
- (b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (c) The skill required in the particular occupation;
- (d) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) The length of time for which the services are to be performed;
- (f) The method of payment, whether by the time or by the job;
- (g) Whether or not the work is a part of the regular business of the principal; and
- (h) Whether or not the parties believe they are creating the relationship of employer-employee.

In addition to the common law factors, the *Borello* test adds an inquiry into factors such as 1) the remedial purpose of the legislation, 2) whether the alleged employees are within the intended reach of the legislation, and 3) the bargaining strengths and weaknesses of each party.

In *Milky Way Dairy* (2003) 29 ALRB No. 4, the Board set forth guidelines on the eligibility of challenged voters in a dairy election and adopted the *Borello* test in determining whether an employee is an independent contractor who is ineligible to vote at ALRB elections.

The Board in *Milky Way Dairy* also affirmed the administrative law judge's ruling to not open challenged ballots where there was *insufficient evidence* (emphasis added) to show that these challenged voters worked during the eligibility period.

Factors that weighed heavily in deciding not to open these challenged ballots included an absence of payroll records, conflicts in declarations and testimony, and adverse inferences drawn from the company's failure to provide evidence available to them to show that they worked during the eligibility period.

Under Section 2(3) of the NLRA, independent contractors are specifically excluded from the definition of "employee". In *Chemical Workers v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 78 LRRM 2974, 2977, the Court stated that the term "employee" must be understood with reference to the purpose of the NLRA and the facts involved in the economic relationship. The legislative history of Section 2(3) indicated that the term "employee"

was not to be stretched beyond its plain meaning embracing only those who work for another for hire.

Employer efforts to monitor, evaluate and improve the results or ends of the worker's performance do not make the worker an employee. *North American Van Lines v. NLRB* (D.C.Cir. 1989) 869 F.2d 596, 130 LRRM 2837, 2840. The Employer's control of only the results to be achieved indicates an independent contractor relationship. The issue of independent contractor status depends on the dynamics of the work relationship and the facts of each case. No one factor is determinative².

In addition to the common law indicia of factors, other relevant factors include (1) the nature of the parties' understanding, (2) indicia of entrepreneurial activity and risk, (3) the worker's ownership of tools of the trade and (4) the method of compensation and tax withholding³.

Another factor to consider is the community of interest⁴ among the workers that have similar interests and working conditions.

² *North American Van Lines v. NLRB*, *supra*, 130 LRRM at 2840; *Metro Cars, Inc.* (1992) 309 NLRB 513, 515, citing *News Syndicate Co.* (1967) 164 NLRB 422, 423-424; *Pierre's Vending Company, Inc.* (1985) 274 NLRB 1219, 1220; *Precision Bulk Transport* (1986) 279 NLRB 437 at 437.

³ *Metro Cars, Inc.*, *supra*, at 515; *North American Van Lines v. NLRB*, *supra*, 869 F. 2d at 599, 130 LRRM at 2840; *Pierre's Vending Co.*, *supra*, at 1220.

⁴ *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

A review of factors such as method of wages or compensation, different work hours, separate supervision, dissimilar qualifications, training and skills, time away from work site, infrequency or lack of contact with other employees, and lack of integrating with work functions of the other employees are all dispositive in determining the status of an employee.

A. CHALLENGED VOTERS

(1) Kasey Avila: Kasey Avila is currently in high school and the owner's nephew. He was not listed on the eligibility list. In his signed sworn declaration, he stated that he worked 21 hours during the February 13 to 26 eligibility period.

Avila believed he was paid \$5 per hour on a weekly basis. He stated that his work included cleaning the barn, moving cows, driving the tractor, and data entry.

The Petitioner objected to counting Avila's challenged ballot stating that Avila was not an agricultural employee during the eligibility period. The Petitioner submitted evidence from worker witnesses indicating that Avila was never seen doing any agricultural work during the eligibility period.

The Employer did not provide a written statement regarding its position on Avila's challenged ballot, but submitted a \$20 petty cash voucher for "general maintenance" dated February 27--the date is beyond the eligibility period. Significantly, this petty cash voucher does not state when the work was performed, rate of pay, number of hours worked, amount of deductions withheld, or social security number or worker identification number.

Additionally, there is conflicting evidence since Avila stated that he worked 21 hours during the eligibility period, however, the Employer submitted a \$20 petty cash voucher that represented Avila's earnings. No other documentation was provided by the Employer to show that Avila worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that the Employer has not provided sufficient and adequate information to establish that Avila worked as an agricultural employee during the eligibility period. I, therefore, recommend that the challenge to his ballot of Kasey Avila be sustained and his ballot not be counted.

(2) Kennen Avila: Kennen Avila is currently 12 years old and the owner's nephew. He was not listed on the eligibility list. In his signed sworn declaration, he

stated that he worked 5 days in February. He stated that his work included shoveling salt, cutting hay, and turning off milk machines.

The Petitioner objected to the counting of Avila's challenged ballot stating that Avila was not an agricultural employee during the eligibility period. The Petitioner submitted evidence from worker witnesses that indicate that Avila was never seen doing any agricultural work during the eligibility period.

The Employer did not provide a written statement regarding its position on Avila's challenged ballot, but submitted a \$20 petty cash voucher for "general maintenance" dated February 27--the date is beyond the eligibility period. Also, there is conflicting evidence between Avila stating he worked 5 days during the eligibility period and, according to the Employer, receiving a \$20 petty cash payment as his earnings.

Significantly, this petty cash voucher does not state when the work was performed, rate of pay, number of hours worked, amount of deductions withheld, or social security number or worker identification number. The Employer did not submit any other documentation to show that Avila worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that the Employer has not provided sufficient and adequate information to establish that Avila was employed as an agricultural worker during the eligibility period. I, therefore, recommend that the challenge to the ballot of Kennen Avila be sustained and his ballot not be counted.

(3) Kevin Avila: Kevin Avila is currently a 10th grader in high school and the owner's nephew. He was not listed on the eligibility list. In his signed sworn declaration, he stated he worked as a fertilizer scraper for about 8 hours per week earning \$6.50 per hour, and was paid cash on a weekly basis. He admitted that he did not have a work permit.

The Petitioner objected to counting Avila's challenged ballot stating that Avila was not an agricultural employee during the eligibility period. The Petitioner submitted evidence from worker witnesses that indicate that Avila was never seen doing any agricultural work during the eligibility period.

The Employer did not provide a written statement regarding its position on Avila's challenged ballot, but submitted a \$20 petty cash voucher for "general maintenance" dated February 27--the date is beyond the eligibility period. There is conflicting evidence between

Avila stating he worked an average of 8 hours per week at \$6.50 per hour and the \$20 petty cash voucher that the Employer paid him for his work.

Significantly, this petty cash voucher does not state when the work was performed, rate of pay, number of hours worked, amount of deductions withheld, or social security number or worker identification number. The Employer did not submit any other documentation to show that Avila worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that the Employer has not provided sufficient and adequate information to establish that Avila was employed as an agricultural worker during the eligibility period. I, therefore, recommend that the challenge to his ballot be sustained and his ballot not be counted.

(4) John Flores: John Flores was not listed on the eligibility list. In his signed sworn declaration, he stated that he does the yard work and cuts the lawn and is supervised by the owner.

The Petitioner objected to the counting of Flores' challenged ballot stating that he was not an employee during the eligibility period.

The Employer did not provide a written statement regarding its position on Flores' challenged ballot but submitted a \$100 petty cash voucher for "general maintenance" dated February 27--the date is beyond the eligibility period.

Significantly, this petty cash voucher does not state when the work was performed, the rate of pay, number of hours worked, amount of deductions withheld, or social security number or worker identification number. The Employer did not submit any other documentation to show that Flores worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that the Employer has not provided sufficient and adequate information to establish that Flores was employed by Employer in the appropriate unit during the eligibility period. I, therefore, recommend that the challenge to the ballot of Flores be sustained and his ballot not be counted.

(5) Caroline Hanstad: Caroline Hanstad was not listed on the eligibility list. In her signed sworn declaration, she stated that she has her own business called QBTUTOR on the Internet and works as a consultant. She submitted an invoice listing the days and hours worked.

She also stated that the Employer issues her a 1099 at the end of the year. She admitted that she does bookkeeping and time card summaries for Employer and did not sign a W-4 form. She stated that no taxes were withheld from her and that she does her own taxes. She admitted that she submits invoices in her name or in the name of her business QBTUTOR, which has about 200 customers. The Better Business Bureau has her business listing with a February 1989 start-up date.

The evidence shows that Hanstad worked as an independent contractor under her own business QBTUTOR, provided an invoice to the Employer for her data entry services, receives a 1099 from the Employer who does not withhold any taxes, and performs all her work without supervision.

The Employer did not provide a written statement regarding its position on Hanstad's challenged ballot. The Employer submitted an invoice from "QBTUTOR" and billed to Artesia Dairy for data entry services totaling \$1,484.99. No other documentation was provided by the Employer to show that Hanstad worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that Hanstad was not an employee of the Employer, but was an independent

contractor providing data entry services during the eligibility period. I, therefore, recommend that the challenge to the ballot of Hanstad be sustained and her ballot not be counted.

(6) Jesus Manuel Meza: Jesus Manuel Meza was not listed on the eligibility list. In his signed sworn declaration, he stated that he did not work during the eligibility period because he was on disability leave. He stated that he has been on disability leave since he was injured at work on October 28, 2005.

Petitioner agreed to open Meza's challenged ballot based on Meza being on disability leave. The Employer, however, has objected to opening Meza's ballot on the basis that there was no reasonable expectation that Meza will ever work at the dairy again.

The Region conducted its investigation and concluded that that the evidence shows that at the time of the March 7 election, Meza continued to have a reasonable expectation of returning to work. During the period up to the March 7 election, there was no evidence showing that Employer advised Meza that the company did not have a job for him when he returned to work.

Based on the foregoing, I, therefore, recommend that the challenge to the ballot of Meza be overruled and his ballot be counted.

(7) Antonio Morais: Antonio Morais was not listed on the eligibility list. In his signed sworn declaration, he stated that he was a cattle hauler with his own business listed under his social security number and worked only 6 hours from February 13 to February 26 and was paid \$8 per hour. He stated that he was not supervised and uses his own truck and trailer. He admitted that he provided worker Darren Rebelo to help him on an as-needed basis and pays him directly.

He also stated that he sends invoices to the Employer for his work. He admitted that he works for other companies with the majority of work done at Tulare Livestock Yard. He bills all customers using his company invoice.

According to the evidence, Morais' performed work consistent with being an independent contractor. He admits to having his own business that hauls cattle, was paid by the Employer to move livestock, works for other businesses, bills clients with his own invoices, and works without any supervision. He also provides his own worker and pays him directly.

The Employer did not provide a written statement regarding its position on Morais' challenged ballot but submitted a \$1,526 petty cash voucher for "livestock hauling" dated February 27--the date is beyond the eligibility period. Significantly, this petty cash voucher does not state when the work was performed, rate of pay, number of hours worked, amount of deductions withheld, or social security number or worker identification number.

The Employer submitted a copy of a February 20th pay stub for \$1,526 payable to Morais for "freight and trucking". This pay stub, however, did not state when the work was performed, rate of pay, number of hours worked, and amount of deductions withheld. No other documentation was provided by the Employer to show that Morais worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that Morais performed work as an independent contractor during the eligibility period. I, therefore, recommend that the challenge to the ballot of Morais be sustained and his ballot not be counted.

(8) Angie Pacheco: Angie Pacheco was not listed on the eligibility list. She refused to sign challenged ballot declaration. The Employer submitted a check stub that

showed 50 hours at \$7 per hour with earnings of \$1,750.00 and net pay of \$1,602.12.

The Petitioner objected to the counting of Pacheco's challenged ballot stating that she worked in childcare and not as an agricultural employee at the dairy during the eligibility period. The Petitioner submitted evidence from worker witnesses that indicated that Pacheco was not an agricultural worker, but rather a babysitter for the owner's children.

The Employer did not provide a written statement regarding its position on Pacheco's challenged ballot but did provide a copy of the payroll stub showing that she worked 50 hours at \$7 per hour and earned \$1,750. No other documentation was provided by the Employer to show that Pacheco worked as an agricultural employee during the eligibility period.

There is insufficient evidence upon which to make a conclusion as to the extent of Pacheco's duties and responsibilities. No declarations have been submitted regarding what Pacheco's actual duties are with the Employer.

I, therefore, recommend that the ballot of Pacheco not be counted and the resolution of the challenge thereto be held in abeyance until a final decision has been rendered

regarding the other challenged ballots herein and until it is known whether this ballot would be outcome determinative.

(9) Rosa Pacheco: Rosa Pacheco was not listed on the eligibility list. In her signed sworn declaration, she stated that she works 2 hours per day, 1 day per week cleaning the company office. She averaged about 6 to 8 hours per week cleaning the owner's house. She began working at the dairy on November 2004 and did not receive a W-2 from the dairy. She earned \$10 per hour and was paid cash with no deductions. She admitted that she pays all her taxes.

She admitted that she does cleaning work for another company and works 40 hours per week earning \$8.50 per hour. She received a W-2 form from this other company and is currently on its payroll.

The Petitioner objected to the counting of Pacheco's challenged ballot stating she was not an agricultural employee during the eligibility period.

The Employer did not provide a written statement regarding its position on Pacheco's challenged ballot, but submitted a \$180 petty cash voucher for "office maintenance" dated February 27--the date is beyond the eligibility period. Significantly, this petty cash voucher

does not state the when the work was performed, rate of pay, number of hours worked, amount of deductions withheld, social security number or worker identification number. No other documentation was provided by the Employer to show that Pacheco was an agricultural employee that worked during the eligibility period.

Based on the foregoing, I conclude that the Employer has not provided sufficient and adequate information to establish that Rosa Pacheco worked as an agricultural employee during the eligibility period. I, therefore, recommend that the challenge to the ballot of Pacheco be sustained and her ballot not be counted.

(10) Sergio Rey: Sergio Rey was not listed on the eligibility list and was alleged to be a supervisor. In his signed sworn declaration, he stated that he is the workers' supervisor and the workers will call him if they have a problem. He admitted that he is in charge of six other workers and reviews their work. He also stated that he meets with two other supervisors, Victor and Marvin. When Rey was first hired, Marvin told him that he was a supervisor.

The Petitioner objected to the counting of Rey's challenged ballot stating that he is a statutory supervisor. The Petitioner also submitted evidence from

worker witnesses indicating that Rey had exercised supervisory duties during the eligibility period. The evidence showed that Rey supervises the workers that drive the machinery and that he also assigns and gives orders to the workers.

The Employer did not provide a written statement regarding its position on Rey's challenged ballot, but submitted a payroll summary showing \$1,923 for February 13 to February 26. No quantity of hours or rate of pay was stated. No other documentation was provided by the Employer to show that Rey was an agricultural employee and not a statutory supervisor.

Based on the foregoing, I conclude that the evidence is sufficient to establish that Rey was a statutory supervisor during the eligibility period. I, therefore, recommend that the challenge to the ballot of Rey be sustained and his ballot not be counted.

(11) Alfredo Rodriguez: Alfredo Rodriguez was not listed on the eligibility list. In his signed sworn declaration, he stated that worked during the February 13 to February 26 eligibility period. The investigation revealed that Rodriguez worked as agricultural worker during the eligibility period and a payroll summary showed that he earned \$1,140 for 120 hours at \$9.50 per hour.

On May 24, the Region requested from Petitioner and Employer that they agree that Rodriguez' challenged ballot be opened based on the evidence that shows that he was an eligible voter.

The Petitioner agreed to have Rodriguez' challenged ballot opened. The Employer did not respond to this particular request.

Based upon the foregoing, I conclude that Rodriguez was eligible to vote. I, therefore, recommend that the challenge to the ballot of Rodriguez be overruled and his ballot be counted.

(12) David Rose: David Rose was not listed on the eligibility list. In his signed sworn declaration, he stated that he worked on February 18 for 9½ hrs putting in stanchions—support posts—in the free stall barn and was paid \$20 per hour. He admitted that he has a fulltime job elsewhere and is not self-employed and does not have his own business. He did not sign a W-4 and admitted that he takes care of his own taxes. He also stated that no deductions were taken out from his earnings.

The Employer did not provide a written statement regarding its position on Rose's challenged ballot, but submitted an \$830 petty cash voucher for "livestock panel installation" dated February 27—the date is beyond the

eligibility period. Significantly, this petty cash voucher does not state the when the work was performed, rate of pay, number of hours worked, amount of deductions withheld, or social security number or worker identification number.

The Employer submitted a copy of an \$830 pay stub payable to Rose for "Dairy-Phase Two" dated February 27-- this date is beyond the eligibility period. This pay stub did not state when the work was performed, the rate of pay, the amount of deductions withheld, and the type of work performed.

Also, there was contradicting evidence regarding Rose's number of hours worked, the amount he was paid, and the type of work he did during the eligibility period. No other documentation was provided by the Employer to show that Rose worked as an agricultural employee during the eligibility period.

Based on the foregoing, I conclude that the Employer's evidence was contradicting and insufficient to establish that Rose was employed by Employer in the appropriate unit during the eligibility period. I, therefore, recommend that the challenge to his ballot of Rose be sustained and his ballot not be counted.

(13) Hector Vera: Hector Vera was not listed on the eligibility list. In his signed sworn declaration, he

stated that he was a cattle inseminator whose job duties included recommending discipline or correcting a worker's work. He stated that he recommends the hiring of potential workers to management. He also stated that he earns \$14 per hour, with a \$1,900 salary every two weeks.

The Petitioner objected to the counting of Vera's challenged ballot on the basis that he is a statutory supervisor. The Petitioner submitted evidence from worker witnesses that indicate that Vera exercised supervisory duties during the eligibility period. The evidence showed that Vera's duties include giving work orders to workers and being in charge of the dairy when the foreman is off work.

The Employer did not provide a written statement regarding its position on Vera's challenged ballot, but submitted a payroll summary showing that Vera earned \$1,923.08 for February 13 to February 26. No quantity of hours or rate of pay was stated on this payroll summary.

Based on the foregoing, I conclude that the evidence is sufficient to establish that Vera was a statutory supervisor during the eligibility period. I, therefore, recommend that the challenge to his ballot be sustained and his ballot not be counted.

(14) Victor Vera: Victor Vera was not listed on the eligibility list and was alleged to be a supervisor. In his signed sworn declaration, he stated that he was hired as a breeder and outside worker. He is paid \$2,307.89 every 2 weeks and admits that he does not use a time clock like the other employees. He stated that he checks and ensures that workers are performing their duties correctly. Although he stated that he has no authority to hire or fire, he can recommend the hiring and firing of workers. He also stated that workers call him if they will be sick.

The Petitioner objected to the counting of Vera's challenged ballot stating that he is a statutory supervisor. The Petitioner submitted evidence from worker witnesses that indicate that Vera exercised supervisory duties during the eligibility period. The evidence showed that Vera's duties include the hiring and firing of workers and giving work orders to workers.

The Employer did not provide a written statement regarding its position on Vera's challenged ballot, but submitted a payroll summary showing that Vera earned \$2,307.69 for February 13 to February 26. The number of hours worked and rate of pay were not indicated.

Based on the foregoing, I conclude that the evidence is sufficient to establish that Vera was a statutory

supervisor during the eligibility period. I, therefore, recommend that the challenge to the ballot of Vera be sustained and his ballot not be counted.

(15) John Verkaik: John Verkaik was challenged as a statutory supervisor. In his signed sworn declaration, he stated that he was the head mechanic. He stated that he hired Taylor Howarth and that he supervises Howarth and another fulltime worker. Verkaik is paid \$20 per hour, works 10 hour per day for 6 days per week.

The Petitioner objected to the counting of Verkaik's challenged ballot stating he is a statutory supervisor. The Petitioner submitted evidence from worker witnesses that indicate that Verkaik exercised supervisory duties during the eligibility period. The evidence showed that Verkaik was the shop supervisor in charge of the mechanics in the shop and that he also recommended dismissal of workers.

The Employer did not provide a written statement regarding its position on Verkaik's challenged ballot, but submitted a payroll summary showing Verkaik's earnings of \$2,427 for February 13 to February 26. No quantity of hours or rate of pay was stated.

Based on the foregoing, I conclude that the evidence is sufficient to establish that Verkaik was a statutory supervisor during the eligibility period. I therefore

recommend that the challenge to his ballot be sustained and the ballot not be counted.

IV.

SUMMARY OF RECOMMENDATIONS

A. Challenges to these Ballots Should Be Sustained

1. Kasey Avila
2. Kennan Avila
3. Kevin Ayala
4. John Flores
5. Caroline Hanstad
6. Anthony Morais
7. Rosa Pacheco
8. David Rose
9. Sergio Rey
10. Hector Vera
11. Victor Vera
12. John Verkaik

B. Challenges to these Ballots Should Be Overruled

1. Alfredo Rodriguez
2. Jesus Manuel Meza

C. Unresolved - If Not Outcome-Determinative, Not to be Opened and Counted. If Outcome-Determinative, Set for Hearing

1. Angie Pacheco

V.

PROCEDURES REGARDING EXCEPTIONS TO THE REPORT:

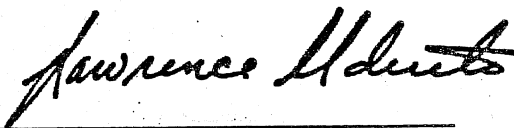
Under the provisions of 8 Cal.Code Regs. Section 20363(b), the foregoing conclusions and recommendations of the Regional Director shall be final and conclusive unless exceptions thereto are filed with the Executive Secretary

of the Board by personal service within five (5) days, or by deposit in registered mail postmarked within five (5) days, from the date of service upon the parties of this Report.

An original and six (6) copies of the exceptions shall be filed and shall be accompanied by seven (7) copies of declarations or other documentary evidence in support of the exceptions.

Copies of any exceptions and supporting documents shall be served under 8 Cal.Code Regs. Section 20166 on all other parties to the proceeding and on the Regional Director making this Report, and Proof of Service shall be filed with the Executive Secretary of the Board with the exceptions and supporting documents.

Dated: June 12th, 2006



Lawrence Alderete
Visalia Regional Director
Agricultural Labor Relations Board
711 N. Court Street, Suite H
Visalia, California 93291-3638
Tel. 559-627-0995

**AGRICULTURAL LABOR RELATIONS BOARD
CONSEJO DE RELACIONES DEL TRABAJO AGRICOLA**

Employer (Patrón) Jelle H. Reitzma Dairy Date of Election (Fecha de la Elección) March 7, 2006

Case Number (Número del Caso) 06-RC-1-VI Date Issued (Fecha de Salida) _____

TALLY OF BALLOTS — CUENTA DE VOTOS

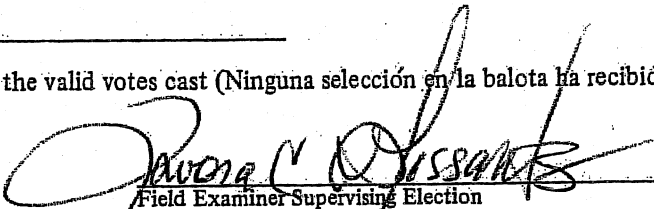
The undersigned board agent certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

(El agente del consejo suscribiente certifica que el resultado de la cuenta de las balotas dadas en la elección del caso citado arriba, y concluida en la fecha indicada arriba, fué la siguiente:)

- | | |
|---|----------------|
| 1. Votes cast for (Votos a favor de): | Tally (Cuenta) |
| a. <u>UFW</u>
Petitioner. | <u>25</u> |
| b. _____
Intervenor. | _____ |
| c. _____
Intervenor. | _____ |
| d. No Unión | <u>24</u> |
| | <u>15</u> |
| 2. Number of unresolved challenged ballots (Número de votos retados y no resueltos): | _____ |
| 3. Total number of all ballots including unresolved challenged ballots. (Número total de votos válidos mas los votos retados y no resueltos): | <u>64</u> |

Number of void ballots (Número de votos invalidos):	<u>0</u>
Total number of voters (Número total de votantes):	<u>102</u>
Number of names on list (Número de nombres en la lista):	<u>104</u>

4. The number of unresolved challenged ballots is sufficient to affect the outcome of the election (El número de votos retados es suficiente para afectar el resultado de la elección).
5. The number of unresolved challenged ballots is insufficient to affect the outcome of the election, and (El número de votos retados no es suficiente para afectar el resultado de la elección, y):
- a. A majority of the valid ballots counted has been cast for (Una mayoría de los votos válidos que fueron contados han sido dados a favor de): _____
- b. No choice on the ballot has received a majority of the valid votes cast (Ninguna selección en la balota ha recibido una mayoría de los votos válidos).


Field Examiner Supervising Election

The undersigned witnessed the counting and tabulation of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained and that the results were as indicated above. We also acknowledge service of a copy of this tally.

Los suscribientes presenciaron la cuenta y la tabulación de la votación citada arriba. Aquí certificamos que la cuenta y la tabulación fueron hechas justa e imparcialmente, que el secreto de la votación fué mantenido y que los resultados fueron como se ha indicado arriba. También reconocemos el servicio de una copia de esta cuenta.

For (Por) _____

For (Por) _____

For (Por) _____

For (Por) _____